THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

In re BRIAN A. KITTS, Debtor.	)	BK Case No. 05-27158 JAB Chapter 7
J. KEVIN BIRD, Chapter 7 Trustee, Plaintiff, vs. WINTERFOX, LLC, Defendant.	)	Adversary Proceeding No. 06-02250

FILED
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DISTRICT OF UTAH

FULL TRANSCRIPT

TRIAL

December 1, 2009

VOLUME I

BEFORE THE HONORABLE JUDITH A. BOULDEN

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CHRONOLOGICAL INDEX OF WITNESSES

PLAINTIFF'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
George Bybee	30	55		
Aaron Olivarez	56	116	125, 142	139
Russell Walker	145	149		
Kent Plott	151			
Rob Haertel	180			

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* * * * *

SALT LAKE CITY, UTAH, TUESDAY, DECEMBER 1, 2009, 9:04 A.M.

* * * * *

(Called to order the Court.)

THE COURT: Would you call the calendar, please.

THE CLERK: This is in the matter of Brian Arthur Kitts, Bird vs. Winterfox, LLC.

THE COURT: Would parties note their appearances.

MS. BOULEY: Adam Affleck and Aaron Millar for Chapter 7 Trustee, Kevin Bird.

MR. JUBBER: Your Honor, Gary Jubber and Sara Bouley, Fabien Clendenin, on behalf of Winterfox.

THE COURT: All right. This matter has been scheduled for trial today. I know that there are several motions that are pending as motions-in-limini. The parties are also aware that the scheduling order imposed time limits in the case, and those time limits will be enforced as to opening and closing arguments and evidentiary presentation. You may check with Ms. Freeman at any time during the proceeding to see what the timing is that we have, and if you don't use all of the time for your opening arguments, you may apply it to the time that you've indicated for your evidentiary presentation.

There are five motions-in-limini that have been filed. I have reviewed those motions-in-limini. I don't need for their oral argument on the motions-in-limini, and will make rulings at this point on the record regarding those motions-in-limini.

The Defendant has filed a motion-in-limini to exclude the expert testimony of Rob Cartrell concerning the availability of other loans. That section of his expert testimony regarding the hypothetical that is based in part on the $30,000 per month income, I have reviewed that and will deny that motion-in-limini. That matter will be considered by the Court and will not be stricken.

The motion-in-limini also filed by the Defendant under Rule 37(c) to exclude evidence with respect to damages and dismissal of damage claim pursuant to 15 USC §1640(a)(1) and (a)(4) that is Docket No. 251 on the docket, this is the motion-in-limini that gives me the most polis; but after due consideration, I'm going to grant that motion, but only in part.

I will allow the Estate to present their damage claims based upon the July and the August supplements that were filed by the Trustee, but excluding, is an odd way to put it, excluding the asterisk. In the August 25th, 2009, second supplement there is a reference to interest and in the exhibit to that supplement there is a chart of actual damages for mortgage loans Brian Kitts had paying from Winterfox LLC with an asterisk. That asterisk refers to the following.

"If Brian Kitts is required to pay extension fees and pre and post-petition interest to Winterfox, such fees and interest will also be factored into the actual damages asserted by the Trustee." That's stricken. There's no calculation for that, and to the extent that the motion-in-limini covers that, that portion of the motion-in-limini is granted.

The motion-in-limini to exclude evidence on timely disclose, which is Docket No. 249 filed by Winterfox, is granted. The motion-in-limini to exclude the expert report and testimony of Roger ++Kater, who was the title expert that has been filed by the Estate, is denied. The motion-in-limini to exclude the third opinion in the expert report and testimony of David Luna is granted.

All right. Would you present your opening statements.

MR. AFFLECK: Good morning, Your Honor. Adam Affleck for Kevin Bird. The evidence in this case, Your Honor, will show that in December 2004 the Debtor Brian Kitts was facing foreclosure on his home from three lien creditors, and that he needed funds on an emergency basis to refinance those loans and save his home from foreclosure. He hired a mortgage broker named Michael Falk. Michael Falk, in turn, contacted another mortgage broker named Aaron Olivarez. Aaron Olivarez worked for Winterfox or found loans for Winterfox.

Winterfox was a hard-money lender that did not have a license to do residential mortgages in the State of Utah. Notwithstanding that fact, Winterfox agreed to make two loans -- or one loan, actually, that ended up being two loans on -- to Mr. Kitts secured by his residence; a loan of 1,350,000 on December 8th and another loan of $39,603.47 a few weeks after.

Mr. Kitts defaulted on these loans, they were short-term loans, failed to pay, and Winterfox threatened to file an illegal deed in lieu of foreclosure that they had obtained in connection with these loan transactions. Mr. Kitts, believing that Winterfox could record those deeds without going through the foreclosure process, filed a bankruptcy to prevent it.

After he filed his bankruptcy through his counsel, Mr. Kitts requested that Winterfox provide him with the Truth In Lending Act disclosures that were required to be given to him at the time the loans were made. The evidence will prove that Winterfox did not make those disclosures, did not send those disclosures at the time of the loans, but made them up after the fact. The evidence will further show that Winterfox's agents have perjured themselves to conceal its failure to give those in a timely manner.

The evidence will further show that even if the disclosures that Winterfox claims to have been given in a timely manner were, in fact, given, those disclosures were defective under the requirements of TILA.

Winterfox will attempt in this trial to show that its fraudulent conduct is immaterial by arguing that Kitts got the loans for a business purpose. To support their claim of a business purpose, Winterfox will point to undisputed facts that Mr. Kitts' home, legal title to his home was held in Sun Peak both before and after the loans were paid. Notwithstanding this fact, Your Honor, the undisputed facts will show that the loans were, indeed, for a consumer purpose.

No matter who the property is titled in, the evidence will show, and this will be undisputed evidence, will show that Brian Kitts and his family lived in the home. It was where they slept, it was where they had family dinners, it was where they celebrated holidays, it was where their children came home after school. The evidence will show that the purpose of this loan was to save that family dwelling from foreclosure, and the evidence will further show that Winterfox understood this fact.

It will be shown by, among other things, Your Honor, the disclosures that Winterfox prepared after the fact showing and indicating that this property was Mr. Kitts' family residence. To the extent that title is relevant to the purpose of the loan, why Mr. Kitts got this loan, the evidence will show that at the time the loans were obtained, it was Mr. Kitts who held legal title to the property. The evidence will also show that the proceeds of the loan were used to pay off liens on the property that had been incurred both for a consumer purpose and a business purpose, mixed purposes, but that more than 50 percent of those loans were for family, household and personal purposes, thus, satisfying the requirement under TILA that a consumer debt be "primarily for consumer purposes."

Finally, the evidence will show the Trustee's entitlement to damages. The actual damages which are the difference between the loan that Mr. Kitts got and the loan that he could have got had he received the disclosures and had adequate opportunity to shop the loan, statutory damages of $4,000 per loan, attorneys' fees, and based on the Court's ruling to the extent finance charges have been paid, finance charges in the amount of $87,000.

Thank you, Your Honor.

THE COURT: Ms. Bouley.

MS. BOULEY: Thank you, Your Honor. This is a case where the Trustee is standing in the shoes of the Debtor as attempting to use alter ego as a sword rather than as a shield. He is attempting, in effect, to reverse pierce by arguing that an asset that the Debtor had held out as a corporate asset for many years and which the Debtor was desperate to save from foreclosure was, when it suits his interest for TILA purposes, suddenly a personal asset.

In December of 2004 Sun Peak, one of Mr. Kitts' companies, was facing foreclosure of its primary asset. The property that is at issue in this case. Sun Peak had used this property for many years, and had pulled money out of the property on several occasions to finance its business operations. Sun Peak had filed bankruptcy and had listed this asset, the subject property, on its federals as its primary asset. That bankruptcy was dismissed only a few months before this loan was made. Or, at least, 14 months prior to the loan made by Winterfox, the property was titled in Sun Peak's name. It was also titled in Sun Peak's name for another six -- five to six months after the transaction.

It was transferred into Mr. Kitts' name, the property, for only a brief minute on December 10th of 2004 of record, and again on March 1st, 2005, and then immediately conveyed back to Sun Peak and remained in Sun Peak's name of record until June of 2005 after this bankruptcy case had already been filed. So based upon these two minutes out of 20 months, the Trustee, being Mr. Kitts, is attempting to argue that this was a personal asset, in effect trying to collapse a corporation into Mr. Kitts and trying to characterize what was clearly a loan to save a business asset as a consumer transaction.

Furthermore, the Trustee will try to show that the loan was used to pay off primarily consumer debt when, in fact, his math is fundamentally flawed. He will go to great lengths to show that Washington Mutual, Wells Fargo and the Ed Ingram Construction judgment, which were paid off by the Winterfox proceeds, were primarily consumer in nature, but, in fact, the evidence will show otherwise.

For example, the Ed Ingram Construction judgment was against Sun Peak, yet the Trustee will try to allocate that judgment entirely as personal. All work done by Mr. Ingram was done while Sun Peak -- while Sun Peak was the owner of the property. It was a Sun Peak debt. Similarly, the allocation for Washington Mutual is flawed.

The Trustee will argue that about $277,000 that was pulled out of the equity of the subject property and used to purchase what can only be considered an investment property, as far as Mr. Kitts is concerned, is somehow personal. The Trustee will also argue the property taxes for 2001 accrued -- that accrued while Sun Peak owned the property is personal when, in fact, it was a Sun Peak debt. Also, the Wells Fargo debt was more business than personal. The evidence will show that at least $65,000 of the amounts the Trustee is claiming as consumer debt was actually deposited into Sun Peak's corporate bank account. When all is said and done, the evidence will show that the funds were used primarily to pay off business obligations, not personal loans.

Thus, TILA, the Truth In Lending Act, does not apply because the Winterfox loan was not primarily for personal, family or household purposes. TILA doesn't apply for other reasons as well, as the evidence will show. First, Winterfox did not originate this loan. The loan was presented to Winterfox. Secondly, there was no broker involved. Mr. Aaron Olivarez was licensed as a loan officer and cited as a -- and was a consultant to what -- to Winterfox and nothing more.

The Trustee will try to get around the fact that there was no broker by arguing that there were two loans, but the evidence will show that there was really only one loan ever intended, and that the so-called second loan was made necessary only because there was the shortfall in the first -- in the first amount. And the reason there was a shortfall in the first amount was that Mr. Kitts himself requested additional funding to pay off what appears to be an unsecured obligation to another one of his companies, NevWest, and that necessitated the second loan.

Now the Trustee will attempt to make much of the fact that disclosures were prepared and sent to Mr. Kitts. This is a big red herring for several reasons. First of all, Winterfox is not claiming anything by way of these disclosures. Winterfox stipulates here and now that the disclosures were not adequate and did not satisfy TILA. Winterfox's position is that TILA does not apply because it was a consumer transaction, but even more importantly the disclosures are a red herring because Mr. Kitts admittedly never received them.

That is the Trustee's position, as stated in his trial brief, and we do not contend otherwise. So the Trustee's alleged -- alleged nefarious conduct is meaningless, as the Trustee himself states on page 11 of his trial brief. "Whether the Court ultimately determines Winterfox made timely notices and disclosures or fraudulently made them up after the fact will be shown to matter little." Well said. They matter very little. In fact, not at all, because Mr. Kitts never got them. All they alleged fraud in the world doesn't amount to anything unless it is, in fact, communicated to the intended recipient. And the only issue in this case is whether TILA does apply and whether Winterfox is liable for any damages.

Now, turning to damages, if the Court were to find that TILA applies, the Trustee cannot show any actual damages under 16(a)(1) or under (a)(4). First, with respect to 1640(a)(1), in its brief and other papers, the Trustee has repeatedly cited the Parem v. GMAC case from the 5th Circuit. In that case the Court stated that few, if any, TILA plaintiffs are proven or can prove actual damages, and this case is no exception. As the Parem case really holds, there has to be detrimental reliance, and there was none here; hence, Mr. Kitts did not read the loan documents because he did not bring his glasses to the closing even though he knew he would be signing loan documents for a loan in well excess of a million dollars. Mr. Kitts could not have relied.

Furthermore, there was no other loan available at the time. In fact, Mr. Kitts was in a panic and Mr. Falk, that he had used for years to help him get loans, had been working on trying to find him conventional financing for some time, and this was the only loan available to Mr. Kitts. There were no actual damages. The loan saved Sun Peak's property from imminent foreclosure. But for the loan, the property would have been lost. So on the contrary to being damaged, Sun Peak's asset -- principal asset was saved, but I suppose no good deed goes unpunished.

Furthermore, as stipulated in the uncontroverted facts, Mr. Kitts has never made a single payment on this loan, has never paid so much as a dime, and it has now been five years. He did not pay anything out of pocket at the closing, and he has paid nothing since. He has been living in the property for five years without paying a thing.

Turning to (a)(4), the statute clearly states that only finance charges and fees actually paid by the consumer are recoverable. The law is clear that only amounts which the consumer has come out of pocket are recoverable. Here there are none. And so for these reasons, Your Honor, we think that the evidence will show in the end that this is not a consumer transaction, that TILA does not apply, and that there are no damages available to the trustee. Thank you.

THE COURT: Thank you.

All right. Mr. Affleck, are you ready to present your evidence?

MR. AFFLECK: Yes, Your Honor.

THE COURT: All right. You've submitted to the Court the Trustee's Objections to Winterfox's Exhibits and Winterfox's Objections to The Trustee's Exhibit List. Am I to take it from those documents that you're stipulating to the admissibility of the documents that aren't objected to?

MR. AFFLECK: For the Trustee, Your Honor, the objections that we reserve on those would be relevance and waste of time; but, otherwise, yes.

THE COURT: I don't know what that means, Mr. Affleck. Are there any documents that the parties are stipulating can be received into evidence?

MR. AFFLECK: Yes, there are.

THE COURT: What ones?

MR. AFFLECK: Your Honor, if I can just go through those. For the Trustee's exhibit -- exhibits, Exhibit No. 1, Exhibit No. 2, and we would offer these exhibits at the same time, Your Honor, if Court would indicate whether they are received. Exhibit No. 1, Trustee would offer that exhibit.

THE COURT: Is there any objection?

MS. BOULEY: No, Your Honor.

THE COURT: All right. If I don't hear an objection from you, I'm just going to receive it. All right?

MR. AFFLECK: Exhibit No. --

THE COURT: Exhibit 1+ is received.

MR. AFFLECK: Exhibit No. 2.

THE COURT: Exhibit 2+ is received.

MR. AFFLECK: Exhibit 3.

THE COURT: Exhibit 3+ is received.

MR. AFFLECK: Exhibit 13.

THE COURT: Exhibit 13+ is received.

MR. AFFLECK: Exhibit 14.

THE COURT: Exhibit 14+ is received.

MR. AFFLECK: 15.

THE COURT: Exhibit 15 is received.

MR. AFFLECK: 17.

THE COURT: Exhibit 17+ is received.

MR. AFFLECK: 20.

THE COURT: Exhibit 20+ is received.

MR. AFFLECK: 22.

THE COURT: Is that 22A?

MR. AFFLECK: 22A. Thank you, Your Honor.

THE COURT: Exhibit 22A+ is received.

MR. AFFLECK: 22C.

THE COURT: Exhibit 22C+ is received.

MR. AFFLECK: 28A.

THE COURT: Exhibit 28A+ is received.

MR. AFFLECK: 28C.

THE COURT: Exhibit 28C+ is received.

MR. AFFLECK: 29.

THE COURT: Exhibit 29+ is received.

MR. AFFLECK: 30.

THE COURT: A?

MR. AFFLECK: 30A.

THE COURT: Exhibit 30A+ is received.

MR. AFFLECK: 30B.

THE COURT: Exhibit 30B+ is received.

MR. AFFLECK: 36A.

THE COURT: Exhibit 36A+ is received.

MR. AFFLECK: 36C.

THE COURT: Exhibit 36C+ is received.

MR. AFFLECK: 39A.

THE COURT: Exhibit 39A+ is received.

MR. AFFLECK: 39C.

THE COURT: Exhibit 39C+ is received.
MR. AFFLECK: 45A.
THE COURT: Exhibit 45A+ is received.
MR. AFFLECK: 45B.
THE COURT: Exhibit 45B+ is received.
MR. AFFLECK: 47A.
THE COURT: Exhibit 47A+ is received.
MR. AFFLECK: 47C.
THE COURT: Exhibit 47C+ is received.
MR. AFFLECK: 48A.
THE COURT: Exhibit 48A+ is received.
MR. AFFLECK: 50.
THE COURT: Exhibit 50+ is received.
MR. AFFLECK: 51.
THE COURT: Exhibit 51+ is received.
MR. AFFLECK: 54.
THE COURT: Exhibit 54+ is received.
MR. AFFLECK: 56.
THE COURT: Exhibit 56+ is received.
MR. AFFLECK: 58.
THE COURT: Exhibit 58+ is received.
MR. AFFLECK: 60. 60.
MS. BOULEY: We have an objection to 60, Your Honor.
THE COURT: The objection's were hearsay, authenticity and foundation. That is a payoff statement from Wamu loan

dated 12-31-04?

MR. AFFLECK: Is that -- is that not the same thing? Is that not the same thing?

MR. MILLAR: That is the same thing.

MR. AFFLECK: Is this the same thing as this?

MR. MILLAR: Yeah.

MR. AFFLECK: May I have just a moment, Your Honor. I think that Winterfox has stipulated to this exhibit, but let me check with counsel for a moment.

THE COURT: Have we resolved the issue?

MR. AFFLECK: It appears, Your Honor, that it has been -- it's part of the Stipulation For Admission of Exhibits that was filed, and I think Winterfox is still trying to confirm that.

THE COURT: Is the document listed more than once, because it's listed T60 with a document filed with the court. Is it listed as objected to?

MS. BOULEY: Yes, Your Honor. That's what I'm trying to . . .

THE COURT: Well, perhaps we can resolve it at a break.

MS. BOULEY: Yes. We'll do that. Thank you, Your Honor. Sorry.

THE COURT: All right.

MR. AFFLECK: Exhibit 64.

THE COURT: Exhibit 64+ is received.

MR. AFFLECK: Those are the Trustee's exhibits that have been stipulated to by Winterfox, Your Honor.

THE COURT: All right. Do you wish to go forward with your exhibits now or do you wish to wait until your case? Ms. Bouley, do you want to wait or do you want to do it now?

MS. BOULEY: No, Your Honor. I think we can go ahead.

THE COURT: All right.

MS. BOULEY: Winterfox Exhibit 5 -- 501. That's actually --

THE COURT: 501+ is received.

MS. BOULEY: 502.

THE COURT: 502+ is received.

MS. BOULEY: 503.

THE COURT: 503+ is received.

MS. BOULEY: 504.

THE COURT: 504+ is received.

MS. BOULEY: 505.

THE COURT: 505+ is received.

MS. BOULEY: 506.

THE COURT: 506+ is received.

MS. BOULEY: 507.

THE COURT: 507+ is received.

MS. BOULEY: 508.

THE COURT: 508+ is received.

MS. BOULEY: 509.

THE COURT: 509+ is received.
MS. BOULEY: 510.
THE COURT: 510+ is received.
MS. BOULEY: 511.
THE COURT: 511+ is received.
MS. BOULEY: 512.
THE COURT: 512+ is received.
MS. BOULEY: 513.
THE COURT: 513+ is received.
MR. AFFLECK: Hang -- hang on, Your Honor. We have no objection to the authenticity of these documents, but we would object on the grounds of relevance.
THE COURT: Which documents?
MR. AFFLECK: Notice of Interest filed by Michael Falk, Exhibit 513.
THE COURT: All right. So 513 is not received.
MS. BOULEY: Your Honor, will we be able to revisit that exhibit later?
THE COURT: Yes. Yes.
MS. BOULEY: Okay. Okay. 514.
MR. AFFLECK: Objection. Relevance.
THE COURT: All right. 514+ is not received at this time.
MS. BOULEY: Thank you, Your Honor. 515.
MR. AFFLECK: Objection. Relevance.

THE COURT: Not received at this time.
MS. BOULEY: 516.
MR. AFFLECK: No objection.
THE COURT: 516+ is received.
MS. BOULEY: 518.
THE COURT: 518+ is received.
MS. BOULEY: 520.
THE COURT: 520+ is received.
MS. BOULEY: 521.
THE COURT: 521+ is received.
MS. BOULEY: 526.
THE COURT: 526+ is received.
MS. BOULEY: 527.
THE COURT: Now, are 527 through 549 not objected to?
MR. AFFLECK: Your Honor, there may -- there may be some exhibits within those that are -- that we have an objection as to relevance only.
THE COURT: Which ones?
MR. AFFLECK: 528, 530, 531, 532, 534, 536, 540, 544, 545. I'm sorry. 544 no objection. No objection to 545 either. I'm sorry, Your Honor.
THE COURT: All right. Anything up to 549?
MR. AFFLECK: That's all of them up to 549.
THE COURT: All right. Now, Ms. Bouley, if you'll make sure that I say the right ones. The following documents are

received: 527, 529, 533, 535, 537, 538, 539, 541, 542, 543, 544, 545, 546, 547, 548, and 549.

MS. BOULEY: I believe that's correct, Your Honor.

THE COURT: All right.

MS. BOULEY: 551.

THE COURT: 551+is received.

MR. AFFLECK: Excuse me, Your Honor. We would object on grounds of relevance.

THE COURT: All right.

MS. BOULEY: 552.

MR. AFFLECK: Relevance.

THE COURT: 553.

MR. AFFLECK: Relevance.

THE COURT: 544.

MR. AFFLECK: Relevance.

THE COURT: 556.

MR. AFFLECK: Relevance.

THE COURT: 557.

MR. AFFLECK: Relevance.

THE COURT: 558.

MR. AFFLECK: Relevance.

THE COURT: 559.

MR. AFFLECK: Relevance.

THE COURT: 560.

MR. AFFLECK: Relevance.

THE COURT: 562.

MR. AFFLECK: Relevance.

THE COURT: 563.

MR. AFFLECK: Relevance.

THE COURT: 564.

MR. AFFLECK: Relevance.

THE COURT: 565.

MR. AFFLECK: Relevance.

THE COURT: 566.

MR. AFFLECK: Relevance.

THE COURT: 582.

MR. AFFLECK: Relevance.

THE COURT: 586.

MR. AFFLECK: Relevance.

THE COURT: 588.

MR. AFFLECK: Relevance.

THE COURT: 589.

MR. AFFLECK: Relevance.

THE COURT: 593.

MR. AFFLECK: Relevance.

THE COURT: 595.

MR. AFFLECK: Rele -- I think that's stipulated, Your Honor, but let's see here. Relevance. Otherwise, stipulated though.

THE COURT: Well, I'm either admitting it or I'm not, Mr. Affleck, contrary to what the documents are that have been filed.

MR. AFFLECK: Objection.

THE COURT: 597.

MR. AFFLECK: Relevance.

THE COURT: 598.

MR. AFFLECK: Relevance.

THE COURT: 599.

MR. AFFLECK: Relevance.

THE COURT: 600.

MR. AFFLECK: Relevance.

THE COURT: All right. Then, Ms. Bouley, you're certainly welcome to bring up the issue as your case progresses.

MS. BOULEY: All right. Thank you, Your Honor.

THE COURT: All right. You may call your first witness.

MR. AFFLECK: George Evan Bybee.

THE COURT: Sir, would you come forward and be sworn, please.

THE CLERK: Come and stand here, please. Answer into the microphone.

(Witness is sworn.)

THE CLERK: Please take the witness stand, and state your name and spell it for the record.

THE WITNESS: My name is George Evan Bybee. That's G-e-o-r-g-e, E-v-a-n, B as in boy, Y as in yoke, B as in boy, E as in echo, E as in echo.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Winterfox is an LLC. Correct?
A. That's correct, sir.
Q. And you are the manager of Winterfox?
A. That's correct, sir.
Q. Are you also the hundred percent owner?
A. No, sir.
Q. Who are the owners?
A. My wife and my family.
Q. And what percentages?
A. I believe it's -- well, there's a total of seven children, myself and my wife, and so it's one-ninths I believe.
Q. So each person has one-ninth each?
A. Yes, sir.
Q. And are you the sole manager of Winterfox?
A. Yes, sir.
Q. Is Winterfox currently in the lending business?
A. No, sir.
Q. But it was for a short time, wasn't it?
A. Yes, sir.

Q. Is that between 2003 and 2005?
A. Approximately.
Q. During that period, did Winterfox make approximately six loans?
A. Did it make what, sir?
Q. Approximately six loans.
A. I believe that's correct, sir.
Q. And that would be including the loan to Brian Kitts?
A. That's correct.
Q. Now, Winterfox was asked to produce all documents relating to these loans. Correct?
A. Yes, I was, sir.
Q. And Winterfox did so after the entry of a protective order to protect confidential information. Is that correct?
A. I believe so.
MR. AFFLECK: Your Honor, at this juncture I'd like to ask a few questions about materials that have been designated as confidential by Winterfox. The protective order issued by the Court indicates that anybody who hears or sees confidential information has to agree not to divulge that information, and I believe the -- Winterfox has requested that the record be sealed from the public view with respect to those questions. So I'm alerting the Court

that as of this moment, I want to ask some questions that would be covered by that confidentiality provision.

I know that Mr. Kitts, who is in the courtroom, has agreed to that confidentiality provision. Mr. Bird, who is in the courtroom, has not. Ms. Laurel Kitts, who is the Debtor's wife has not, and I would imagine that the court personnel will be deemed to have accepted that. But I would ask, Your Honor, if Winterfox requests that either Mr. Bird and Ms. Kitts agree to the confidentiality provisions of that order or that they be excused.

THE COURT: Counsel.

MR. JUBBER: Your Honor, yes, we would ask that they to be -- agree or be excused.

MR. AFFLECK: Your Honor, I would -- I would ask that Mr. Bird be permitted to agree to keep the information that he hears from this point on regarding loans that Winterfox made to persons other than Brian Kitts confidential, that it not be shared in any other context except in the context of this trial, and I would ask for Mr. Bird to consent to that at this point.

THE COURT: Mr. Bird, do you want to do that on the record if that's your intent?

MR. BIRD: So agreed, Your Honor.

MR. AFFLECK: And I would ask if Ms. Laurie Bird is -- or Laurie -- Laurie Kitts. I'm sorry, Your Honor. Her maiden name actually is Bird -- would also agree to the same.

THE COURT: Ma'am, if you're going to agree, I need you to come forward and say so on the record; otherwise, I'm going to ask you to step out.

MS. KITTS: I agree.

THE COURT: All right.

MR. AFFLECK: I assume that the court staff and the Marshal also agree, Your Honor.

THE COURT: The clerk staff and the Marshal service also agree, and the Ecro operator will be directed to indicate on the record the point at which you start and stop asking these questions.

MR. AFFLECK: I will try to indicate that. Now I will start.

(Confidential portion omitted.)

MR. AFFLECK: The confidential portion is over.

THE COURT: All right. Thank you.

MR. AFFLECK: I apologize.

THE COURT: I'm sorry, Mr. Bybee.

MR. AFFLECK: Probably over four questions ago.

Q. So Aaron Olivarez and Marco Fields are the persons that you were referencing?

A. That's correct.

Q. And they indicated to you that they had people at

times that were looking for loans you could lend money to?
A. They represented that they had people who came -- that Aaron was in that market, that people were coming to him all the time looking for investment loans, for investment properties and business purposes.
Q. Was it Aaron Olivarez who introduced you to the lending opportunities that we discussed a few minutes ago?
A. Yes, sir.
Q. Who let you know -- or who let Winterfox know that Mr. Kitts needed a loan? Was that also Aaron Olivarez?
A. I believe that is Aaron Olivarez.
Q. In connection -- and, in fact, Winterfox made loans through Brian Kitts, correct? In December? Two loans?
A. No. I believe we -- we made a loan to the business entity called Sun Peak.
Q. Okay. We'll get back to that question, but a loan was made --
A. I think you --
Q. -- that involved Brian Kitts?
A. I believe so.
Q. Okay. In connection with making that loan, did you ever speak with Brian Kitts?
A. No, sir.
Q. Who negotiated the terms of the -- well, I'll just

call it the Kitts loan. I know you might want to call it the Sun Peak loan, but I'll call it the Kitts loan, and that --

A. Okay.

Q. -- will be what I will call it.

A. Okay.

Q. Who negotiated the terms of the loan, or the Kitts loan, in behalf of Winterfox?

A. Principally, Aaron Olivarez.

Q. Who drafted the loan documents?

A. I believe Aaron Olivarez.

Q. Did you do an inspection of the home to evaluate its value as collateral?

A. Me personally, no.

Q. Who did that for you?

A. Aaron Olivarez and I believe Thomas Adams.

Q. What did you understand regarding the value of the property?

A. They presented to me that the value was, I believe 2.2 million with the additions to be made.

Q. And were you convinced that that was true?

A. I believe I was.

Q. Did they show you --

A. I had no reason to not believe them.

Q. Did they give you any information besides just

their word? Show you comparables or --
A. No, they -- they did the --
Q. -- appraisals?
A. They reviewed comparables. I think there was -- I believe they had an appraiser review it, and I believe they went through the home themselves. That's what I was told.
Q. Now, you obtained title insurance for the loans, didn't you?
A. Say again.
Q. You obtained title insurance for the loans, didn't you?
A. I believe we did.
Q. Who assisted Winterfox in doing that?
A. That would have been Aaron Olivarez.
Q. Was Aaron Olivarez an employee of Winterfox?
A. Let me back up to that last question because I'm -- I guess I'm not certain, because I think that that title insurance may have been put on there by Mr. Kitts. But I'm -- it was in the -- the closing. So all I can say is I'm not positive whether I did or whether it was -- was done by Mr. Kitts. But I believe that it was part of the closing documents.
Q. Would you look at Exhibit 55, please.
THE COURT: Sir, you have some exhibit binders there that have --

MR. AFFLECK: May I approach the witness, Your Honor?
THE COURT: You may.
THE WITNESS: And if I open this up, where am I going to open it up to?
MR. AFFLECK: Tab 55.
Q. I'll represent to you that this is a loan policy of title insurance, and the name of the insured on the second page is Winterfox, LLC. Have you seen this document before?
A. Perhaps. It's nothing that I am familiar with.
Q. Does this refresh your recollection as to whether Winterfox obtained title insurance on the property?
A. Well, it says that it's insured.
Q. And the follow-up question was did you arrange for this title insurance policy or did someone do it on behalf of Winterfox?
A. I didn't personally do it, sir, so it must have been done for and on behalf of Winterfox.
Q. And do you know who did it? Who?
A. That's what I'm saying. I'm not -- I'm not certain whether Mr. Kitts did or whether Aaron Olivarez did it.
Q. Is there any reason that you can think of that Mr. Kitts would buy a title insurance policy for Winterfox?
A. Well, as part of the closing documents whatever --

many times who's going to pay for what is handled at the closing and prior to, and that's -- I'm just saying that's my -- my doubt, and I just don't know it personally.

Q. Okay. Fine. All right. Now, was Aaron Olivarez an employee of Winterfox?

A. No, sir.

Q. Was Marco Fields an employee of Winterfox?

A. No, sir.

Q. Did Marco Fields ever become an employee of Winterfox?

A. No, sir.

Q. Does Marco Fields work for Winterfox currently?

A. No, sir.

Q. What was the length or what -- for what time period did Marco Fields have a business relationship with Winterfox?

A. I don't know the date as much as I know I met her in -- as a mortgage person putting a mortgage together for a house that I had helped my one of my associates purchase, and I met her in that process, and that had to be in 2002-ish.

Q. And Marco had involvement with the loans that we talked about earlier today and this Brian Kitts loan?

A. She had some responsibility in the process. She wasn't the primary person. She aided in putting together looking at the comps and looking at it from a mortgage standpoint, and Aaron headed the team looking at the loans, he brought the loans, and Tom Adams was my brother-in-law who had a real estate background. And so I had asked him to look at things from his perspective and verify or validate what they were seeing.

And so it was -- that was the team that I had put together since I personally had no experience in the area and didn't trust my own abilities in an area that I don't have experience in.

Q. Was -- or were Aaron Olivarez and Marco Fields paid from the proceeds of the kit loan -- Kitts loan transaction?

A. I believe so.

Q. And what were they paid for? Why were they paid?

A. I don't know. I was not aware that I'm -- that -- in my memory, that Aaron was to receive anything from the loan proceeds. I was subsequently shown documents that said that he were -- that he was reimbursed. My understanding at the time was that when the loan was successful, then I would pay them a percentage of that, that successful loan in the -- it was a floating loan between one, two, three percent.

Q. I'd like you to turn to Exhibit 10 if you would.

A. 10? That's not in this book.

MR. AFFLECK: May I approach the witness, Your Honor?
THE COURT: You may.
Q. (BY MR. AFFLECK) This is a copy of the discovery responses that Winterfox provided to the Trustee in this case. Is -- is that your signature on the second to the last page? Or I'm sorry. It may not be the second to the last page. It would be the Bates number at the bottom right-hand corner. Kitts 20546.
A. 20546. Yes, sir, that's my signature.
MR. AFFLECK: I'd ask the Court to receive Exhibit 10.
THE COURT: Any objection?
MS. BOULEY: No objection, Your Honor.
THE COURT: Exhibit 10 is received.+
Q. (BY MR. AFFLECK) I'd like you to refer to page 16 of Exhibit 10, if you would, and your answer on behalf of Winterfox to Interrogatory No. 7. And I'll just read it to you.
"Identify all written disclosures given to you" --
A. Given by you.
Q. "Given by you," thank you, "to the Debtor prior to consummation of the first loan. Response: Documents labeled Bates Nos. Winterfox 1 through Winterfox 17 constitute the disclosures sent by Winterfox in connection with the first loan on December 5, 2004."
Did I read that correctly?

A. I believe so.

Q. And Interrogatory No. 8. "Identify all written disclosures given to you by the Debtor" --

A. Given by you.

Q. Thank you.

-- "given by you to the Debtor prior to consummation of the second loan. Response: The documents labeled with Bates Nos. Winterfox or WF18 through WR36 constitute the disclosures sent by Winterfox in connection with the second loan on December 29th, 2004."

Did I read that correctly?

A. Yes, you did.

Q. Now if you would turn, please, to Exhibit 7. In Exhibit 7, I'll represent to you, are the documents labeled Winterfox 1 through Winterfox 17.

A. Okay.

Q. And these are the documents referenced in the first interrogatory that I read to you. Correct? 1 through 17?

A. I believe that's correct.

MR. AFFLECK: I'd ask the Court to receive Exhibit 7 for the purpose of showing what disclosures were sent to the Debtor.

MS. BOULEY: And, Your Honor, we'd object on the grounds of hearsay. They haven't been authenticated.

There's a lack of foundation here. Mr. Bybee couldn't -- has not seen these, did not see these documents back at the -- back in December 2004. And, also, hearsay.

MR. AFFLECK: Your Honor, these documents are identified by Winterfox in its discovery responses as the documents that were sent to the Debtor in December 2004, prepared by Winterfox and sent by the Debtor. We are offering these for the purpose of showing what documents were prepared by Winterfox and allegedly sent to the Debtor.

THE COURT: All right. Counsel, is there some dispute that these are the documents that were referenced in the interrogatories?

MS. BOULEY: No, Your Honor. There's not. Not as to that one.

THE COURT: All right.

MS. BOULEY: We'd also object, Your Honor, on the grounds of relevancy; that Winterfox has already stipulated that Mr. Kitts did not receive his disclosures, and so this whole line of questioning, we would say, ought to be excluded under Rule 403 as just a waste of time. It's simply not relevant to the issues before the Court.

THE COURT: Trustee's Exhibit 7 is received.+

MR. AFFLECK: Thank you, Your Honor.

Q. If you'll turn to Exhibit 8, these are Winterfox documents labeled or identified as 18 through 36 which were identified in the second interrogatory that we read as the disclosures that were sent on December 29th, 2004. Are these the documents that you referenced in your discovery response?

A. I believe they were submitted in discovery, yes.

MR. AFFLECK: I would ask the Court to receive Exhibit 8.

MS. BOULEY: Your Honor, we have the same objections.

THE COURT: All right. Thank you. Exhibit 8 is received.+

Q. (BY MR. AFFLECK) Now, these disclosures and notices that are Exhibits 7 and 8, you didn't prepare those yourself, did you?

A. No, sir.

Q. They were prepared by Marco Fields. Is that your understanding?

A. I thought they were prepared by Aaron Olivarez.

Q. So it's your understanding that these disclosures were prepared by Aaron Olivarez?

A. Aaron or Marco, but I think Aaron was the -- the primary responsible person for the documentation.

Q. And do you know if Aaron Olivarez is the one who sent them to the Debtor or was that Marco Fields?

A. I don't know, sir.

Q. And during this time period that these were prepared and sent, Aaron Olivarez and Marco Fields were working on behalf of Winterfox. Is that right?

A. Well, they were working on behalf of themselves as consultants.

Q. And why do you say -- why do you use the word consultant?

A. Well, I'm trying to help you distinguish between the fact that -- that they weren't employees. They were simply consultants with their own interest at heart and to make certain they performed things properly which I asked them to do on behalf of Winterfox.

Q. So they were authorized to do things on behalf of Winterfox relating to these files?

A. They were asked to perform -- to produce the documents and perform all documentation properly.

Q. From the loan proceeds, Winterfox was paid $62,500. Is that right?

A. I believe so, sir.

Q. And what was that for?

A. That's referred to as points. That's interest that's paid up front out of the proceeds of the loan. In other words, I supply the same amount of money they return back to me.

Q. Would you look at Exhibit 56.

May I approach the witness, Your Honor?

THE COURT: You may.

THE WITNESS: What's that? Okay. Okay.

MR. AFFLECK: Your Honor, I believe this document --

THE COURT: It's already received.

MR. AFFLECK: -- is received into evidence.

Q. This is a settlement statement prepared in connection with the Kitts loan, and if you look on the second page, very top of the page, it indicates an origination fee of $87,500. Was the $62,500 that was paid to Winterfox designated in this settlement statement as an origination fee?

A. I don't know, sir.

Q. Do you know how much was paid to Aaron Olivarez and Michael Falk?

A. I have no idea.

Q. Isn't it true that it was $25,000?

A. I don't know, sir.

Q. I would represent to you, sir, that that is a stipulated fact --

A. Okay.

Q. -- in the pre-trial order in this case.

A. All right.

Q. So --

A. You asked me what I remembered, and I don't remember.

Q. Okay. I understand. 25,000 minus 87,500 is 62,500. Does that refresh your recollection as to why Winterfox was paid on this loan?

A. No, it doesn't refresh my recollection. I don't -- I wasn't aware that at the time Aaron Olivarez or Michael Falk received anything.

Q. Do you see anything else on this settlement statement that shows a payment to Winterfox in the amount of $62,500?

A. In the amount of what?

Q. $62,500.

MS. BOULEY: Objection. Assumes facts not in evidence.

THE COURT: Not that question. The objection's overruled.

THE WITNESS: So what's your question again, sir?

Q. (BY MR. AFFLECK) Is there anything in this settlement statement that shows a payment to Winterfox in the amount of $62,500? And I will represent to you, sir, that it is a stipulated fact that Winterfox received $62,500 from the proceeds of this loan.

A. Okay.

Q. And so I'm asking you: Is there anything on this settlement statement that shows why that amount was paid to Winterfox?

A. So then what's your question? I do not see a -- a

60 --

Q. Do you see a $62,500 payment there?

A. No, I don't, sir.

Q. Isn't it true that it was the norm for Winterfox to charge origination fees in the loans that it did?

A. Well, whether it was called an origination loan or the points, I probably knew it more as the term points. It was a, again, I didn't necessarily call it origination fee. I called it points. That was part of the negotiated interest rate and points at the time of the loan.

Q. You recall in your deposition being asked this question: Do you typically charge an origination fee for a hard money loan?

A. Yeah. Yes, I do.

Q. You recall --

A. Yes, sir.

Q. You recall your response?

A. I believe I said that Winterfox typically charged an origination fee. In reviewing that and thinking of that, at the time that I answered that, that sounded correct to call it an origination fee. I'm simply adding to that that you call it origination fee, but in my own mind and memory it was the points on the loan.

Q. So at the time of your deposition when you testified that you believed that it was typical for

Winterfox to charge an origination fee, you've thought about it it's -- and, in your mind, it's no longer an origination fee?

A. No, sir. I'm simply qualifying that calling it an origination fee is what I believe Mr. Millar referred to it as. In my mind I equated that with the points. And so to have a point of reference to talk about what the points were and calling it an origination fee, I'm not certain there's a difference. I don't know that there's a difference, but I'm explaining what I understood in my mind.

Q. Okay. Would you look at Exhibit 9, please. This is a letter from Russ Walker, who was Brian Kitts' attorney, to Gary Jubber. Gary Jubber was counsel for Winterfox in March 2006. Is that right?

A. Yes, sir.

Q. Have you ever seen this letter before today?

A. No, sir. I'd have to read it.

Q. Take a minute and look at it.

A. It's a lot of legal terms, sir, that I don't know that I personally read it, but I'm sure that my legal counsel did.

Q. My question was: Have you ever -- did you see this letter before or before this case was filed before this case was going?

A. Did I receive it before what?

Q. Did you receive this letter? Have you seen this letter before?

A. I believe if I had not seen it, I was informed of its contents.

Q. Okay.

A. In general terms.

Q. And do you remember what you were informed of?

MS. BOULEY: Objection, Your Honor. That would call for attorney-client communications. We'd only know this letter from attorneys.

MR. AFFLECK: Attorney-client privilege, Your Honor, applies when the information is being shared for the purpose of seeking legal advice by the client to the attorney and by the attorney to the client in giving legal advice. We are trying to establish Winterfox's notice through its manager of a claim by Brian Kitts that TILA disclosures were not made in connection with this loan. So we would submit, Your Honor, that it is not covered by the privilege and it is proper evidence to be received by the Court.

MS. BOULEY: Your Honor, there's -- there's no indication that, of course, Mr. Jubber is a manager of Winterfox, so I would also point out that Mr. Jubber was bankruptcy counsel at the time. He was not authorized to accept or receive correspondence on behalf of Winterfox for all purposes.

Also, you know, object to this line of question. Again, the letter is irrelevant. It was attached with the rescission claim that's now been dropped.

THE COURT: All right. I'm not going to require Mr. Bybee to disclose what his attorney told him regarding this letter, Counsel, so the objection's sustained.

Q. (BY MR. AFFLECK) At some point, did you become aware of a demand from Mr. Kitts that Winterfox provide him with disclosures that would have been given to him in connection with making the Kitts loans?

A. I remember at some point my counsel asking me if there was --

MS. BOULEY: Objection, Your Honor. Again, this is going to attorney-client communications.

THE COURT: Mr. Bybee, I think it's a yes or no answer.

THE WITNESS: Oh. Then state it again.

Q. (BY MR. AFFLECK) At some point did you become aware of a request or demand by Mr. Kitts that Winterfox supply him with copies of the Truth In Lending Act disclosures that were given to him in connection with the Kitts loans?

A. Yes.

Q. When did you become aware?

A. I don't know a time frame, sir. I know it was -- I believe it was in with -- connection with asking for all documentation that I may have had or the people that had Marco and Mr. Olivarez and Mr. Adams had worked on the project, and was there anything that had not been found or turned in. And so I went back to all three and asked for documentation that they might still have.

Q. As to the timing of that, do you recall whether that was in 2005 or 2006 of you becoming aware of this fact?

A. I couldn't tell you.

Q. But after becoming aware of it, you do recall speaking with Marco and Aaron Olivarez to see if the documents and disclosures were done properly. Is that right?

A. Yes, sir.

Q. What did they tell you?

A. Well, there was two occasions.

MS. BOULEY: Objection. Hearsay.

THE COURT: Do you have any exception, Counsel?

MR. AFFLECK: It's offered for purpose of showing notice to Winterfox.

THE COURT: Well, it may be, but do you have an exception?

MR. AFFLECK: I think a hearsay exception if it's not to prove the truth of the matter asserted --

THE COURT: All right.

MR. AFFLECK: -- it comes in.

THE COURT: If it's not for the truth of the purpose asserted, then the objection's overruled.

MR. AFFLECK: And it -- and is for the purpose of showing Mr. Bybee's notice and Winterfox's notice.

THE COURT: You may answer.

THE WITNESS: There was two occasions that my counsel simply asked me to make certain that they had all --

MS. BOULEY: Objection, Your Honor. It's calling for attorney-client privilege. Move to strike.

THE COURT: Sustained. And the answer is stricken to the extent that there was one. Can you ask the question again.

Mr. Bybee, maybe you could listen really carefully. I don't want you to tell us anything that your attorney told you.

So Mr. Affleck.

Q. (BY MR. AFFLECK) My question or what we were talking about is you learned sometime, can't remember, that the Debtor had made a request or demand for copies of TILA disclosures. After learning of that, you called Marco Fields and Aaron Olivarez to see what they had done, and the -- I think your testimony was, and this is my question, what did they tell you?

MS. BOULEY: Objection. Hearsay.

THE COURT: And the objection was overruled. So it's not what your attorney told you; what the other three people told you.

THE WITNESS: Thank you, ma'am.

I remember in general terms, when I answered yes to the previous question, I have some -- I have to make certain in my mind I -- I -- I'm being very exact with this. There was early on in, like, January after the loan had funded and then it was additional monies that he had required for what was an extension on the loan or additional amounts on the loan, and I had asked Tom Adams, Aaron Olivarez, Marco Fields if all documentation, if they had crossed their I's or crossed their T's and dotted their I's and turned in all the documents and had all the documents available to us, and they answered at that time yes.

They looked at the documents and came back to me in a short time and said -- I believe Tom Adams pointed out that it was missing a -- a -- what do they call it -- in lieu --

Q. Deed In Lieu Of Foreclosure?

A. Deed In Lieu Of Foreclosure that wasn't in the documents. And I said well, then let's get it done, needs to be done. And Aaron responded that Mr. Kitts was certainly willing to do that, and so I said great. Make certain all of our documents are -- are in order. That's -- that's key to be assured of that.

Sometime later, and I -- and this would have been significantly later, after the loan then went south or went into non-payment and we were turning -- and Mr. Kitts had declared bankruptcy, so it was after that point, then -- and I really didn't have much contact with Aaron Olivarez or even Marco at that time, but I believe I was asked is there anything else that you need to turn in. And I'm not sure when anyone mentioned to me or said to me well, it's -- we're looking for some disclosures, because I don't recall that -- anything specific about that until sometime later the term disclosures was what someone was looking for.

But I went back to Aaron and Marco and said turn in everything you have. We're still looking for the documents, and I don't have them. Tom Adams had passed away and I couldn't find any of the documents that -- that he was supposed to have kept, and so I had to ask them to do that. And it's unclear in my mind whether I even was asked for any -- that I asked for disclosures or anything else. I just asked for all documentation.

So somewhere after that it came into my cognizance that someone was asking for a specific item, and so yes, I became aware. I don't know when that was.

MR. AFFLECK: No further questions, Your Honor.

THE COURT: Ms. Bouley, do you have Cross at this time?

MS. BOULEY: Yes, Your Honor.

///

CROSS EXAMINATION +

BY MS. BOULEY:

Q. Mr. Bybee, just wanted to clarify one thing in, terms of the 62,500 that was paid to Winterfox --

A. Yes, ma'am.

Q. -- was that rolled into the loan?

A. Yes, ma'am.

Q. You have not received any payments from Mr. Kitts. Correct?

A. No, ma'am.

Q. Okay. Thank you.

No further questions.

THE COURT: Do you have anything further of this witness?

MR. AFFLECK: No, Your Honor.

THE COURT: Sir, you may step down.

THE WITNESS: Thank you.

THE COURT: You ready to proceed?

MR. AFFLECK: Yes. Thank you, Your Honor. Ironically, both witnesses arrived at the same time. We have the unopened package and Mr. Olivarez here, and we would call Mr. Olivarez at this time.

THE COURT: Sir, would you come forward and be sworn, please.

Come and stand here, please. Answer into the microphone.

(The witness is sworn.)

THE CLERK: Please take the witness stand, and state your name and spell it for the record.

THE WITNESS: Aaron Olivarez. It's A-a-r-o-n. Olivarez, O-l-i-v-a-r-e-z.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Sir, what is your current employment?
A. Actually, race car driver.
Q. Were you involved in the mortgage lending industry in the past?
A. I was.
Q. Were you employed by Citywide?
A. I was.
Q. And what was Citywide's business?
A. They were a mortgage broker.
Q. And what was your title --
A. Loan officer.
Q. -- with Citywide? Loan officer?
What did you do?
A. I was -- I found and put together loans for them.
Q. Did you originate loans for Citywide?
A. Yes.
Q. Did you do residential or investment properties?

A. I did both.
Q. What was -- or do you currently have a relationship, a business relationship with Winterfox?
A. No.
Q. At some point, did you?
A. Yes.
Q. At some point did you start doing loans for Winterfox?
A. Loans for them, no. Consulting is what I did with them.
Q. Okay. So you did consulting for Winterfox. And why do you use that word?
A. Well, because we weren't out looking for loans or what you would say originating loans the way I was for Citywide.
Q. When did you -- what period of time did you work for Winterfox?
A. Sometime in 2004 through the beginning of 2006.
Q. And who approached you from Winterfox?
A. Evan --
MS. BOULEY: Objection.
THE WITNESS: -- Bybee.
MS. BOULEY: Objection. Assumes facts not in evidence.
THE COURT: Well, it's already answered.
Q. (BY MR. AFFLECK) What did Mr. Bybee approach you

to do?

A. Well, we had spoken about lending private funds that Winterfox had had that they had available to lend.

Q. And did you do private loans for Winterfox or did you -- were you involved, you would say, as a consultant for Winterfox in private loans?

A. Yes.

Q. Did you work as a consultant or in any other capacity for any other private money or hard-money lender?

A. No.

Q. How many loans did you do for Winterfox?

A. I don't know for sure. Maybe four or five.

Q. Were you an employee of Winterfox?

A. No.

Q. In these transactions that you worked as a consultant for Winterfox in, were you acting as Winterfox or for Winterfox?

MS. BOULEY: Objection. Calls for a legal conclusion.

THE COURT: I'll allow the witness to answer.

THE WITNESS: I'm sorry?

THE COURT: You may answer.

THE WITNESS: Again, I was -- I was consulting them, giving advice on potential loans. Was I acting for them? I was helping process the loans. That's all.

Q. (BY MR. AFFLECK) Do you recall your deposition being taken in this case?

A. Yes.

MR. AFFLECK: Your Honor, may I approach the witness and the Bench?

THE COURT: You may.

Q. (BY MR. AFFLECK) I've handed you a copy of your deposition. I'd like you to -- and I've given a copy to the Court, and the Court has unsealed that deposition.

THE COURT: Excuse me. Counsel.

MR. AFFLECK: Yes.

THE COURT: What I have is the exhibits marked for identification in the deposition of Mr. Olivarez taken on April 6. These are the exhibits. They're not the deposition.

MR. AFFLECK: I'm sorry, Your Honor. I meant to give you two packages.

THE COURT: All right. All right. And this is Mr. Olivarez's deposition on April 6, 2009, and there are no corrections or changes?

MR. AFFLECK: Yes, Your Honor.

Q. If you would turn to page 15 of your deposition. And I refer you to line 12.

"Q So you introduced the borrower to Winterfox?"

It actually says induced, but I think the word is introduced the borrower to Winterfox.

"A No, because I was acting -- I was acting as Winterfox. Or for Winterfox, rather. And so, really, it was we want to lend the money and take some of your deals. If they look good, let's take a look at them."

Do you remember testifying?

A. I remember the question, yes, and I remember saying that. Yeah.

Q. What did you mean by that; that you were acting as or for Winterfox?

A. Well, you had asked -- we were talking about who was bringing loans at the time, and you asked if I introduced the two, and he had brought a package. We told him we could look at it. That was referring to Michael Falk, I believe.

Q. Okay. So you would sit -- would you still say that you did not introduce the borrower, Brian Kitts, to Winterfox?

A. Well --

Q. But that you were acting as Winterfox or for Winterfox?

A. Didn't -- didn't Michael Falk introduce Brian Kitts to Winterfox? If I was processing for Winterfox, Michael Falk would have introduced.

Q. Okay. So you were -- your testimony is you didn't introduce or bring the loan to Winterfox; you were Winterfox?

A. I was acting for Winterfox, yes.

Q. What does it mean to you to underwrite a loan?

A. The underwriting process for these type of loans is to make sure it's a clean loan, it's a -- that the equity is there so the private money would not be at risk or in a position to be lost, and the underwriting process basically is a checks and balancing system to make sure that all those things are in place.

Q. Is it true that you were basically underwriting loans for Winterfox in 2004?

A. You could call it that, yes. Processing, underwriting. There's a few different words.

Q. You mentioned a man by the name of Michael Falk?

A. Uh-huh.

Q. And you know Michael Falk?

A. I do.

Q. How do you know him?

A. I -- he is someone I had done business with prior to this time, and that's -- that's it.

Q. Did you understand that Michael Falk was a mortgage broker?

A. Yes.

Q. And isn't it true that he told you that he was a mortgage broker?

MS. BOULEY: Objection. Hearsay.

MR. AFFLECK: Your Honor, I would ask that the witness be permitted to answer this question for the purpose of impeaching Mr. Falk who has filed a declaration under penalty of perjury in this case that he is not a mortgage broker and wasn't a mortgage broker in this transaction.

THE COURT: So is impeachment an exception to the hearsay rule?

MR. AFFLECK: It is, Your Honor. It is not offered for the truth of the matter asserted. It is offered for the purpose of impeaching Michael Falk's expected testimony in this case which has been shown already by a declaration filed under penalty of perjury, prepared by Winterfox that he was not a mortgage broker.

THE COURT: All right. I'll receive the testimony if not for the truth of the matter.

Q. (BY MR. AFFLECK) Did Michael Falk tell you that he was a mortgage broker?

A. Yes. He did.

Q. Did Michael Falk call you to solicit a loan from -- or for Brian Kitts?

MS. BOULEY: Objection. Hearsay.

MR. AFFLECK: It is -- it is for the purpose of showing

why he did what he did to explain his conduct, Your Honor.
THE COURT: Not for the truth of the matter then?
MR. AFFLECK: Not for the truth of the matter.
THE COURT: All right. The objection's overruled.
Q. (BY MR. AFFLECK) Did Michael Falk call you to solicit a loan for Mr. Kitts?
A. Yes. He called and asked if we would lend money on a property.
Q. When did he call you?
A. I'm not certain of the dates. Just --
Q. Was it --
A. It would have been just a few days before this loan funded.
Q. So the first loan in this case from the documents is dated December 8th, 2004, so that would have been in early December?
A. Very early December.
Q. Or, perhaps, late November?
A. Could have been.
Q. Okay.
A. It's -- we had a very short time line to get this done, so it couldn't have been more than a few days.
Q. Did you tell Michael Falk that you were working with a group that could provide a loan?
A. He asked if -- what I was doing and if we had

money available.

Q. And did you tell him that you were working with a group that could provide a loan?

MS. BOULEY: Objection. Leading.

MR. AFFLECK: Your Honor, Mr. Olivarez is an agent of Winterfox. The rule, I think it is Federal Rule of Evidence 611, allows a party, even if they call a witness, if it is an adverse party or a person who is I believe the word is associated or, perhaps, connected with an adverse party, to ask leading questions.

THE COURT: Objection's overruled.

You may answer the question, sir.

THE WITNESS: What was the question again?

Q. (BY MR. AFFLECK) Did you tell Mr. Falk that you were working with a group that could provide a loan to Mr. Kitts?

A. Yes. I told him I was working with Winterfox and they did have money to lend.

Q. Did Michael Falk send you a package of materials so that you could evaluate whether to recommend the loan to Winterfox?

A. Yes, he did.

Q. Did you use the materials, this package of materials to evaluate whether to give the loan?

A. Yes.

Q. What was in the package?
A. Anything that was needed at the time, meaning credit report.
Q. So a credit report of Mr. Kitts?
A. A Uniform Loan Application, a generic one that was -- was already filled out. I believe a title report and an appraisal on the home.
Q. What about taxing --
THE COURT: Excuse me, Mr. Affleck. I'm not sure that the witness answered one of the questions. I think one of your questions was whether there was a credit report, and I don't know that the witness answered. He may have shaken his head.
MR. AFFLECK: Okay. Let me -- let me start over, if I might, Your Honor. We're talking about a package that was given to Mr. Olivarez by Mr. Falk.
Q. My question was: What was contained in that package. Was there a credit report in the package?
A. Yes.
Q. And was that a credit report of Mr. Kitts?
A. Yes.
Q. Was there a Uniform Loan Application?
A. There was.
Q. Was there a title report?
A. Yes.

Q. Was there an appraisal?
A. Yes.
Q. Was there a document showing Mr. Kitts' pay history?
A. At that point I don't know.
Q. Were there copies of tax returns?
A. At that point I don't know.
Q. Was the Uniform Loan Application filled out?
A. Yes.
Q. And was it filled out by Mr. Kitts?
A. By someone. It was --
Q. Was it -- was it signed?
A. It was signed, yes.
Q. What is contained in a Uniform Loan Application?
A. Basic documentation. Income documentation, information about the property, debt, things like that.
Q. Now, you know -- you no longer have those -- that loan package, the documents that were in that loan package in your possession, do you?
A. No.
Q. What did you do with those documents?
A. They were all with a file that would have been all together, and I haven't seen that in several years.
Q. Did you give that file to Winterfox's legal counsel?

A. It was given to a gentleman that was overseeing that.

Q. A gentleman at a law firm or a gentleman at Winterfox?

A. No. Within Winterfox.

Q. And who was that gentleman?

A. Tom Adams.

Q. Okay. Do you know why the loan package and the information in that loan package were not produced in discovery in this case?

A. I have no idea.

Q. Would a loan package, including the Uniform Loan Application, contain any information that revealed the purpose of the loan?

A. It could have. A Uniform Loan Application is just general information. It's not necessarily a description of what they want.

Q. Is a Uniform Loan Application a generic document that is used by all brokers or is it a different form? What --

A. It's --

Q. Where can I get --

A. It's very generic within the mortgage world.

Q. Okay.

A. You could say that.

Q. Are they basically all the same?
A. Yes.
Q. And you don't know whether a Uniform Loan Application includes a space where the prospective borrower indicates the purpose of the loan?
A. Well, yes. On a -- on a regular mortgage application, it says either refinance or purchase. So it's a check a box. This is outside of -- this loan was outside of those boxes. Again, it's general information that we would have needed to just know who Brian Kitts was.
Q. But that loan package is -- you gave it to someone, and it has not been produced -- you gave it to someone at Winterfox, and Winterfox has not produced that. Correct?
MS. BOULEY: Objection, Your Honor. That assumes facts not in evidence.
MR. AFFLECK: Have you --
THE COURT: Sustained.
Q. (BY MR. AFFLECK) Have you seen the loan package in your deposition or any of the documents that you have reviewed in this case?
A. No.
Q. Now, Winterfox ultimately made two loans to Mr. Kitts in December 2004. Is that right?
A. Yes.

Q. A loan for $1,350,000 on December 8th, one for $39,604.87 on -- a few weeks later, between December 24th and December 31st. Is that right?

A. I know there were two loans. I don't know the exact amounts at this point.

Q. Does that sound correct?

A. Sounds correct.

Q. Why were there two loans instead of one, if you have an understanding of that?

A. The title company that we were asked to use, for whatever reason, didn't have the right payoff, and so we actually came in with more money to help pay off the initial lien on the property.

Q. So it's your understanding that this loan was a refinance?

A. It was a refinance, yes.

Q. And the purpose was pay off the loans, there wasn't enough money to pay off the loans, so a little more money was needed to be loaned to take care of the existing liens on the property?

A. The purpose was to save the property and help with some business debt was my understanding.

Q. Okay.

A. Or cash, rather. Capital.

Q. You've already testified that you reviewed the loan package, and I want to ask you about other things you may have done in connection with these loans. Did you review a title report on the property?

A. Yes.

Q. Did you notice when you reviewed that title report that legal title was in the name of Sun Peak Holdings, LLC?

A. I would have seen that, yes.

Q. Did you notice a Notice of Default on the property filed by Wells Fargo Bank?

A. We knew it was in default, yes.

Q. Did you notice a Notice of Default filed by Washington Mutual Bank?

A. Yes.

Q. Did you notice a lis pendens filed by a Mr. Ed Ingram?

A. Yes. I believe so.

Q. Did you do anything to investigate the nature of these liens?

A. We -- we followed up on them with the title company and found out what they were. They were mortgages.

Q. And did you become aware that the Wells Fargo loan was a -- a loan that was obtained by Brian -- Brian and/or Laurie individually?

A. Yes.

Q. And did you find out the same with Washington

Mutual Bank?

A. Yes. I believe so.

Q. And did you learn that the Ed Ingram lien was a mechanic's lien for making improvements to the residence?

A. Yes. We knew that.

Q. Did you evaluate an exit strategy for the loans?

A. Yes.

Q. What is an exit strategy for a loan?

A. An exit strategy in this -- in our case would be any -- any way to pay us off, meaning permanent financing, commissions, something that would be coming in to actually pay our loan off.

Q. Did Michael Falk show you several pre-approvals on loans that Mr. Kitts had in connection with the loan package or other documents?

A. Yes.

Q. Isn't it true that these pre-approvals -- that these pre-approved loans were the exit strategy for this loan; that this loan would be for a short period of time, Mr. Kitts would obtain other loans for which he had already been pre-approved, and pay off the loan?

A. That was the primary exit strategy, yes.

Q. And isn't it true that that is the reason that you put these loans -- or that Winterfox agreed to make these loans?

A. Yes.
Q. Did you perform a walk-through of the property?
A. Yes.
Q. What was the purpose of the walk-through?
A. The appraisal was not within a couple of months, if I remember right, and so -- well, either way, it doesn't matter. We do a walk-through on every property just to make sure they -- that it is what they say it is. Whether it's an appraiser, the borrower, whoever, that's what we do.
Q. And when did you do that walk-through?
A. Sometime before we funded the loan.
Q. So sometime before December 8th?
A. It would have been before December 8.
Q. And did you determine that the property had sufficient value to support the loan that Winterfox --
A. Yes.
Q. -- was willing to give?
A. Yes.
Q. And did you walk through the house and look at the kitchen and the living room and the bedrooms and that type of thing? Did you look at every room in the house?
A. Yes.
Q. And you were aware, were you not, that that's where Brian, his wife, Laurie, and his children lived?
A. Yes.

Q. Did you negotiate the terms of the loans? For example, the interest rate, points, its origination fees and so forth?
A. I believe I did.
Q. And you did that on behalf of Winterfox?
A. Yes.
Q. Did you draft the loan documents in the case, the loan agreement which is Exhibit 54, the notes and the trust deeds which are Exhibits 1 and 2?
A. Yes.
Q. Would you like to see those documents or will you take my word for it?
A. Which page would they be on?
Q. Exhibits 1, 2 and 54.
May I approach the witness, Your Honor?
THE COURT: You may.
THE WITNESS: 1 I did not and 2 I did not. And 54 I did.
Q. (BY MR. AFFLECK) Do you recall testifying in your deposition that you did prepare the trust deed and the trust deed note that are Exhibit 1 and that are Exhibit 2, the trust deed and the trust deed note?
A. No. If I did, then the question was not clear, because the title company does the trust deeds.
Q. Did you supply the information to the title

company to prepare the trust deeds and trust deed note for Winterfox?

A. No.

Q. Who provided the information, for example, in the trust deed note?

A. Well, let me -- let me clarify that. We would have provided the loan amount.

Q. I'm sorry. Could you --

A. We would have provided a loan amount and a interest rate, but the rest of the documentation on the property and so forth would have been from the title company.

Q. Okay. Let's look at Exhibit 1 on page 2 of that exhibit which is the trust deed note. And in that trust deed note, about in the middle of the page, there are four paragraphs. Do you see those?

A. Yes.

Q. First one identifies the amount of the loan, or the amount of the obligation, and the interest rate. Did you supply that information to whoever prepared this note?

A. Yes.

Q. Second paragraph said it is understood and agreed that an extension may be granted for a period of 30 days and so on. Did you supply that information in paragraph 2 to whoever prepared this note?

A. Yes.

Q. And No. paragraph 3 says it is understood that a deed in lieu shall be deposited with the noteholder and that if it's not paid by February 21st, the lender can record it. Did you provide that information?

A. Yes.

Q. And then the fourth paragraph, "It is understood and agreed that the notemaker is required to secure and maintain insurance on the property." Did you provide the information for that?

A. Yes.

Q. Did you say yes?

A. Yes.

Q. Thank you.

And did you provide the information as to who was the lender?

A. Yes.

Q. And did you provide the information for who was the borrower?

A. Yes.

Q. And is this document consistent with the information that you provided?

A. It appears to be, yes.

Q. And is the same true with respect to the first page which is the deed of trust? Did you supply the

information for who the beneficiary was; Winterfox?
A. Yes.
Q. And the borrower. Did you provide that information?
A. Yes.
Q. And the beneficiary?
A. Yes.
Q. And, also, the other terms in this document?
A. Yes.
Q. But you don't recall actually physically preparing the document?
A. I did not prepare the deed of trust, no.
Q. And can you tell me who did prepare it?
A. I can't. Somebody at I believe it was Deer Creek Title, if I'm not mistaken, in Park City.
Q. Did you provide information for a good faith estimate on the loans for -- for these two loans?
A. Did I provide information for them?
Q. Yeah. Good faith estimate showing -- well, maybe -- let's take a look at the document. That might help. Look at Exhibit 7. Are you there, sir?
A. Uh-huh.
Q. And if you'll turn to the bottom right-hand corner of the page, there are some WF numbers. If you'll turn to WF 8. See that document?

A. Yes.
Q. You see the mailed stamp at the bottom?
A. Yes.
Q. Did you prepare -- did you prepare or provide information to anyone in connection with preparing this document?
A. I would have given no I did not prepare this document. The information would have been within Winterfox.
Q. Okay. And how would Winterfox get that information?
A. From me.
Q. Okay.
A. Or from -- yes.
Q. So is it -- is it your testimony that the information that's contained in this good faith estimate came from you?
A. Yeah. Yes.
Q. And do you know who prepared it? Do you know if it was Marco Fields?
A. I would assume so. But I did not see her prepare it, so I can't say for sure.
Q. Okay. Now, if you'll turn to Exhibit 8 and Winterfox No. 19, WF 19. Did you provide the information that was used to prepare this document as well?
A. Well, let me go back, because yes, I would have

provided some of this information, but the title company would have had to provide certain things on this as well because we don't have a closing fee, a documentation preparation fee, things like that.

Q. Okay. That's fair.

A. So some of this, as with the document before, I would have provided, but not all of this.

Q. Thank you. I do understand that. And I wasn't meaning to mislead you as to that. But for the information that has anything to do with Winterfox origination fees, how much of the total amount of the loan is and so forth, you would have supplied that information?

A. On this -- on the second loan, actually, no, I didn't, because we were told by the title company what the second loan needed to be to clear the debts.

Q. Did the title company decide what the origination fee was or was that something that Winterfox decided?

A. Winterfox would have decided that, and we apparently left it the same as what the first loan was.

Q. Okay. Now, at the closing of the loan or right before the closing of the loan, did you give instructions to the title company regarding the payment of fees in connection with the loan?

A. Payment of which fees? What -- what fees are we talking about? Are you talking loan proceeds or --

Q. Fees to Winterfox, fees to brokers, fees to consultants.

A. I believe I did, yes.

Q. Would you look at Exhibit 61. Is that your signature on the document?

A. Yes.

Q. This is a document that you prepared and sent to Deer Creek Title?

A. Yes.

MR. AFFLECK: Your Honor, I'd ask the Court to receive Exhibit 61.

MS. BOULEY: Your Honor, we object on the grounds of foundation and hearsay as well as authenticity.

THE COURT: Would you lay a better foundation, Counsel.

Q. (BY MR. AFFLECK) Mr. Olivarez, is this your signature on the document?

A. Yes.

Q. Is this a true and correct copy of the document that you prepared and sent to Deer Creek Title?

A. Yes.

Q. And do you recall sending that to Deer Creek Title?

A. Yes.

Q. And you did it for the purpose of informing Deer Creek Title of disbursements to be made on the Brian Kitts loan. Is that right?

A. Well, on this side of -- of it, yes. On the fees. On -- there's obviously disbursements within the loan itself that are not here that would have been in the closing documents.

Q. And was this document prepared and delivered by you in the scope of your employment for Winterfox?

MS. BOULEY: Objection, Your Honor. It misstates testimony. He's not an employee.

THE COURT: Sustained.

Q. (BY MR. AFFLECK) Was this done in connection with your -- with the services that you were providing to Winterfox?

A. Yes.

Q. And that Winterfox had authorized you to do?

A. Yes.

MR. AFFLECK: Your Honor, I'd ask the Court to consider receiving this document now.

THE COURT: Counsel, do you have any objection?

MS. BOULEY: Your Honor, just foundation as to when it was sent. Object on that ground.

THE COURT: All right. I'll allow you to clarify that.

Q. (BY MR. AFFLECK) Mr. Olivarez, do you recall when this document was sent?

A. No. It would have been sometime before the loan actually funded or after funding. Well, actual -- I don't know.

Q. At the bottom of the document there is a Winterfox 761, and there appears to be a date. December 14th, 2004. Does that refresh your recollection of when you might have sent this document?

A. It must have been December 14th, 2004.

Q. Is that your recollection?

A. I -- I -- yeah. You know, I remember putting the document together. I don't remember sending it at all. This is five years ago.

MS. BOULEY: Objection, Your Honor. He doesn't even remember sending this document.

MR. AFFLECK: And I would say, Your Honor, he has just changed his testimony because he did testify that he did send the document. But I think there's sufficient foundation for this document to receive it into evidence as a document that Mr. Olivarez did for Winterfox as its agent. As its agent it comes in over any hearsay objection as an admission. There is sufficient foundation to show when it was given; around the time of the loan. The witness says it must be around December 14th. It should be received.

THE COURT: All right. Exhibit 61 is received.+

Q. (BY MR. AFFLECK) Is it your understanding that the payments identified in this Exhibit 61 were actually made

out of a closing?
A. Yes.
Q. I notice there's a payment to Michael Falk for $12,500. Do you see that?
A. Yes.
Q. What was that for?
MS. BOULEY: Objection. Foundation. Calls for speculation.
MR. AFFLECK: I can lay some foundation, Your Honor.
THE COURT: All right.
Q. (BY MR. AFFLECK) Do you have an understanding as to what that was for?
A. For him putting the loan together for Brian Kitts.
Q. I just asked you do you have an understanding of what it was for. Yes or no?
A. Yes.
Q. And what is the basis of that understanding?
A. For him doing the work and --
Q. What is the -- how did you come to that understanding?
A. That's what he asked for.
Q. And what was it for?
A. For him doing the work for the Brian Kitts loan.
Q. And what was the work he was doing for the Brian Kitts loan?

MS. BOULEY: Objection. Foundation.
THE COURT: Objection's overruled.
THE WITNESS: For him compiling all the information.
Q. (BY MR. AFFLECK) Was he paid for brokering the loan?
A. If that's what you want to call it, yes. It would be a loan broker fee.
Q. Isn't that what you called it in your deposition?
A. It may have been.
Q. Would you like to read that?
A. Sure.
Q. Page 59. If you'll go to lines 13 through 14.
"Q And Michael Falk. What is he getting paid for?
"A For brokering the loan."
Does that refresh your recollection?
A. Yes.
Q. And is that testimony correct?
A. Yes.
Q. Who is -- now turning back to Exhibit 61, who is Heritage Prescott?
A. Heritage Prescott was a company that I -- the company name that I worked under.
Q. Your personal, like a personal --
A. It was a --

Q. -- company you owned?
A. It was a personal business, yes.
Q. Okay. So this -- and was Heritage Prescott paid $12,500?
A. Yes.
Q. And Heritage Prescott is, essentially, you. Is that right?
A. At the time it was myself and Marco Fields.
Q. Okay. What was the purpose of that payment?
A. The consultation fee for underwriting, processing and underwriting this particular loan.
Q. And why is that fee the same as the broker fee paid to Michael Falk?
A. That I don't know. It was generally a certain percentage of the loan amount that was done. The principal.
Q. And was it you --
A. The principal amount.
Q. -- who decided what that amount should be or was that something you negotiated with Winterfox?
A. This is something I had negotiated with Winterfox.
Q. And was this the amount that they had agreed to pay?
A. Yes.
Q. For the questions that it had --
A. We're talking about Heritage Prescott, yes.

Q. Yes. That it had agreed to pay?

A. Yes.

Q. Okay. All right. Did you attend the closings of these loans?

A. The first one, yes.

Q. And did you attend that closing on behalf of Winterfox?

A. Yes.

Q. And in connection with that closing, did you call Winterfox to ensure that the money for the loan was funded?

A. Yes.

Q. I'd like to go back to the loan documents for a moment. Those are Exhibits 1 and 2, if you turn to those. Now, you testified that you negotiated the terms of these loans, and you provided the information from which these loan documents, trust deeds, and trust deed notes were created. Right?

A. Yes.

Q. Let's look just at Exhibit No. 1, the second page which is the trust deed note, and paragraph 2. Oh, I'm sorry. Paragraph 3. It reads it is understood and agreed that a "Deed In Lieu" shall be deposited with the noteholder herein. The notemaker herein acknowledges that in the event that this trust deed note secured by a deed of trust is not paid in Falk on or before February 21, 2005, the noteholder will record said "Deed In Lieu" and take possession of subject -- of the subject property. The notemaker does hereby waive her right to foreclose.

Was there a Deed In Lieu Of Foreclosure executed in connection with this first trust deed note?

A. I believe so.

Q. And have you seen that document?

A. No.

Q. You know what happened to that document?

A. I do not.

Q. Okay. But you do recall that one was -- was prepared and signed by Mr. Kitts?

A. I believe so.

Q. In paragraph 3 it says that it is to be recorded on February 21, 2005. Why is that date important?

A. It wasn't that that date was important; it was that was the term of the -- the note.

Q. So the -- the term of the note was from December 8th when the loan was made to February 21st, 200 --

A. Yes.

Q. -- -5?

A. Yes.

Q. Approximately 75 days?

A. I believe it -- excuse me. I believe what it was was the term of the note plus a grace period before we moved on anything.

Q. Now, if you look at paragraph 1 of the -- of that same document, Exhibit 1, the trust deed note, it says that the note is due and payable on January 24th, which is a little inconsistent with what you just said. And isn't it true that the January 24th date was not the due date of the loan, but was merely put into this loan document in the event that if Mr. Kitts was able to pay it off early, that he would get a discount?

A. That I don't know.

Q. If you would look at your deposition transcript, page 67. Starting at line 3, I'm going to read.

"Q Okay. So basically, if I understand what you're saying, if Brian paid by the 24th, it's the 7 points; if he didn't pay by that time, the repayment would include an additional at 2 percent?

"A 2. Uh-huh.

"Q Okay. But the loan would not be in default on January 24th. Is that right?

"A Not if there was an extension signed.

"Q Was there -- was it required that an extension be signed or --

"A Well, some type of document, because it says it is understood and agreed that the extension may be granted for a period of 30 days.

"Q But it doesn't say how.

"A Well --

"Q And if you look at paragraph 3, you know, it says that a deed in lieu comes into play if it isn't paid by February 21st.

"A Uh-huh.

"Q But the original due date was January 24th.

"A Uh-huh.

"Q And I guess if you add another 30 days, approximately, it comes out to February 212 is it, so was -- I mean, the real due date was February 20 -- 21, wasn't it?

"A What it was basically saying is this: Either way we give you the six weeks, and if it's not done even after the extension, then we need to execute on the Deed In Lieu Of Foreclosure. And, again, we didn't -- we didn't file the Deed In Lieu Of Foreclosure. I mean, let's look at what really happened, and it was months later that Marco finally made the call that upset Brian when he said I'll file bankruptcy because I don't want to deal with her. And so I see what's on paper here, and that should show anybody that that's in question -- or that's questioning it that we were working to get this thing done, giving extensions, if that's what you want to call it. Whatever you want to call it, we didn't ever execute a Deed In Lieu Of Foreclosure and go file it.

"Q What I'm trying to find out is just what was the intent and what was the contemplated term of this note. Was it really January 24th or was it up to February 21st?

"A It was up to February 21st. And if you got it done by January 24th --

"Q You would give him a discount?

"A Then yeah. Because normally the way we did private money lending is this is your points, this is your interest, that's the way it is. But these guys came to us. Not these guys. Michael. Well, no. I will say these guys.

Michael and Brian or --

"Q Michael and Brian?

"A Brian, you know, we wanted to work with him because if it was really going to be a six-week deal, a four-week deal, a three-week deal, which was what, you know, Michael, when he initial -- initially provided to -- provided it to me, it was going to be 14 days in and out. I've got these pre-approvals. We don't want to charge 10 points for something that's only going to be out, and so this is something that we came up with to try and make it a little more reasonable for Brian."

Did I read that correctly?

A. Yes.

Q. And is that your testimony?

A. Yes.

Q. Is that why the good faith estimate that we saw in Exhibit 7 and 8 showed a 10 percent origination fee instead of a 7 percent origination fee; because it included the extra extension?

MS. BOULEY: Objection. Foundation. He didn't prepare these.

MR. AFFLECK: Your Honor, he testified that he provided the information from which they were prepared.

THE COURT: Objection's overruled.

THE WITNESS: I don't know. I would have provided information that was there; however, any information that I would have been provided, or excuse me, provided would have been the same that would have been on the note.

MR. AFFLECK: Okay.

THE WITNESS: So I can't say that that's why it said 10 percent on the good faith.

Q. (BY MR. AFFLECK) Let's look at the second trust deed note, and that is Exhibit 2, and it's the third page of that document. This trust deed note is dated December 31st, 2004, and it has in -- in paragraphs 1, 2, 3 and 4 the exact same language that was in the -- well, actually, not the exact same. The amount of the loan is different. But other than that, it's the exact same language, isn't it?

A. It looks like it's the same, yes.

Q. And the Deed In Lieu Of Foreclosure, which was to be recorded on default, is February -- the date for that is February 21st, 2005. Right?

A. Yes.

Q. Was there -- do you know if there was a separate deed in lieu of foreclosure executed in connection with this second loan?

A. I don't believe so, no.

Q. Was Winterfox relying on the first one?

A. I -- yes.

Q. Okay. Now, if you'll look at Exhibit 3. Did you prepare this document?

A. I don't recall if I did or not.

Q. There is information contained in paragraphs 1, 2, 3, 4 and 5 that is particular to the transaction with Mr. Kitts, but -- well, first of all, do you know who -- if you don't recall preparing this document, do you know who did?

A. If I wouldn't have, it would have been either Marco or Tom.

Q. And would you have provided the information that is contained in paragraphs 1 through 5 for the preparation of this note or this addendum to the trust deed note?

A. Yes.

Q. If you would speak into the microphone.

A. Yes, I would have.

Q. And were these terms that you negotiated on behalf of Winterfox?

A. I believe so, yes.

Q. Okay. What was the circumstance of this addendum? Why?

A. Because we had a promise from both Brian and Michael that they were close to having long-term financing done and having us paid off, so we simply wanted to give them more time. We didn't want --

Q. Okay. So this adden --

A. -- the property. We just wanted to give them the time they needed to finish what they needed to do.

Q. So this addendum was to extend the term of the first and second notes?

A. Yes, sir.

Q. In the paragraph No. 2, it references the first two notes. You see that?

A. Yes.

Q. And the last line says -- well, it identifies the notes. I'll just read it. "It is understood and agreed that this addendum is to serve as an extension to the original trust deed notes for the amount of $1,350,000 executed on December 23rd, 2004." Actually, that was December 8th, wasn't it? "And the second trust deed note for an amount of $39,603.40 executed on December 30th, 2004, are at the note rate of 12 percent with original maturation date of February 21, 2005."

So is this paragraph indicating the parties' understanding that those first two notes had an original -- an original maturation date of February 21, 2005?

A. If that's the way you read it, yes.

Q. I'm asking this is --

A. I mean, that's -- that's what I would think, yes, the way its written.

Q. Was that the intent?

A. Again, I believe if you take all this documentation, it basically says we needed to be paid by February 21st, and if he could get it paid sooner than that, then great. It was but we needed to have it done by February 21st.

Q. Okay. And I'm just trying to clear up a question in my mind as to what the original loan period was. And if you look at paragraph 3, it also references the trust deed notes, and it describes them as having a "original loan period of 75 days." That would take us to the February 21st date. Correct?

A. Correct.

Q. Okay. And is it your understanding -- does this document accurately reflect the parties' intent and what those notes -- the provisions of those notes?

A. I believe so. I mean, looking back and reading it, it seems to -- seems to make sense, yes.

Q. Okay. Just like the other two notes in paragraph 4, there is a Deed In Lieu referenced that shall be deposited with the noteholder, and it provides that the noteholder, Mr. Kitts, will waive his rights to foreclose. You recall whether another Deed In Lieu Of Foreclosure was prepared in this case or prepared at this time?

A. I don't recall.

Q. If you would turn to Exhibit 64. This is a Deed In Lieu Of Foreclosure. Do you recognize this document?

A. Yes.

Q. Is this a document that you prepared?

A. No. I believe the title company would have prepared that.

Q. Is this a document that was prepared at your request on behalf of Winterfox?

A. Yes.

Q. You recognize Brian Kitts' signature on the document?

A. Yes.

MR. AFFLECK: And I believe, Your Honor, that this document has already been received into evidence.

THE COURT: It has.

Q. (BY MR. AFFLECK) This document is dated February 24th, 2005. So is this a second Deed In Lieu Of Foreclosure that was executed in connection with these loans for the -- just for the addendum?

A. I don't know.

Q. Okay. Was the Deed In Lieu Of Foreclosure the final exit strategy for Winterfox? In other words, if the pre-approvals didn't come, here's the final -- here's what we can do; we can just record this Deed In Lieu Of Foreclosure and take the property?

A. Yes. That would have been the very last resort.

Q. But only if Brian was unable to refinance with the pre-approved loans that Michael Falk had shown you?

A. Or come up with the money some other way. Again, the -- the refinances were the primary exit strategy. We were told there was other exit strategies as well.

MR. AFFLECK: I move to strike, Your Honor, as to what he was told based on hearsay.

THE COURT: Sustained.

Q. (BY MR. AFFLECK) Was it part of your duties to ensure that title to the property was insured for Winterfox?

A. Well, it was -- my duty? No. It was a concern. Someone at Winterfox needed to make sure that the property was insured, yes.

Q. Okay. Did you help them make sure it was insured?

A. Yes. I'm sure I did. That --

Q. Okay.

A. -- would have been in line with anything that I did with the title company.

Q. If you would turn to Exhibit 55. Do you recognize this title policy?

A. Yes.

Q. Is this a title policy that you ordered and obtained on behalf of Winterfox?

A. I don't know that I would have ordered it personally, but it's clear that it was for Winterfox.

Q. And would you have provided the information to the title company as to who the insured is, the estate or interest in land, title to the estates and so forth that is contained in the document?

A. That could have been one of three of us. Either myself, Marco, or Tom that would have provided that information.

Q. Would you have reviewed this document for Winterfox to ensure that it was accurate and got the insurance that it paid for?

A. Generally, yes. On this particular one I don't know if I did or not.

Q. But, at any rate, this is the document that you recall being supplied by Deer Creek Title to Winterfox --

A. Yes.

Q. -- representing the policy?

All right. I'd ask the Court to receive Exhibit 55.

MS. BOULEY: All right. And we'd object on the grounds of hearsay to the extent it contains statements stating whether the property was a residence. We would -- again, we would object to it as -- as containing hearsay statements.

MR. AFFLECK: Your Honor, a couple of responses. First, this is a legally operative document. It is a contract between the title company and Winterfox to provide title insurance, so it comes in over a hearsay objection as a legally operative document.

Number two, to the extent it is hearsay, Your Honor, the information supplied to create this policy was supplied by an agent of Winterfox in the scope of his work for Winterfox, therefore, it should come in as an admission also.

THE COURT: Exhibit 55 is received.+

Counsel, we're going to have to break at this time. We'll reconvene at 2:00 o'clock.

THE CLERK: All arise.

(Recess from 11:57 a.m. to 2:02 p.m.)

THE CLERK: All arise. The Court resumes its session. Please be seated.

THE COURT: Mr. Affleck, are you ready to proceed?

MR. JUBBER: Your Honor --

MR. AFFLECK: Yes.

MR. JUBBER: -- before we begin this afternoon, could I just ask for a point of clarification with respect to the Court's order from this morning with respect to its ruling on the motion-in-limini which it granted in part, denied in part. I'm referring to the 37(c) Motion To Exclude Damages.

The Court referred to the asterisk, and I'm looking at that. The August disclosures had a chart attached to it, Exhibit A to that August disclosures, in which it -- there was an asterisk, and the asterisk refers to extension fees and pre and post-petition interest, and I'm assuming from the Court's ruling that that is excluded. That was my understanding. Is that correct?

THE COURT: Yes.

MR. JUBBER: Does that apply whether it be sought under

1640(a)(1) or 1640(a)(4)?

THE COURT: Yes.

MR. JUBBER: Thank you.

THE COURT: Are you ready to proceed with your witness, Mr. Affleck?

MR. AFFLECK: Yes, Your Honor.

THE COURT: Sir, would you resume the stand. You remain under oath.

Q. (BY MR. AFFLECK) Mr. Olivarez, would you turn to your deposition to page 23. I'd like to go over some testimony with you that talks about your prior testimony about your preparation of the documents which are the loan agreement, Exhibit 54, and the notes and trust deeds which are Exhibits 1 and 2.

At page 23 we were talking about Exhibit 3 in the deposition which is Trial Exhibit 34 which is -- or 54 -- which is the loan agreement. Question -- this is at line 18 of page 23.

"Q Okay. Let's look at one exhibit in here. Exhibit 3.

"A (Witness complies.)

"Q This is a loan agreement --

"A Uh-huh.

"Q -- between Brian Kitts and Winterfox?

"A Uh-huh.

"Q It appears to be signed by Winterfox or Brian Kitts --

"A Uh-huh.

"Q -- but not Winterfox. Is this a document you've seen before?

"A Yes. I would have seen it when we put the property -- or when we put the loan together for Brian.

"Q Is this a document that you prepared?

"A I believe I probably did.

"Q And it looks like --

"A I don't remember doing it specifically, but that would have been one of my duties, so I'm sure that I did.

"Q Did you -- so your duties would have included to prepare the documentation?

"A Yes."

Did I read that correctly?

A. Yes.

Q. And that's consistent with your testimony, isn't it, that you recall preparing Exhibit 44 -- or 54? I'm sorry.

A. 54?

Q. 54. That's the loan agreement.

A. Yes.

Q. Okay. Now, if you will turn to your deposition, Exhibit 64. Or I'm sorry. Page 64. I'm sorry. Turn to your deposition, page 64. On page 64 at line 9 we're talking about Exhibit 4 which is Exhibit 1 in the trial which is the trust deed note.

"Q Let's try Exhibit 4. This is a first trust deed note for a loan of $1,350,000?

"A Uh-huh.

"Q Did you draft this?

"A I'm sure I probably did, yes."

Did I read that correctly?

A. Yes.

Q. Is that --

A. And to clarify again, it would have been information that I would have given them; but as far as a trust deed, that's the title company that puts the trust deed together.

Q. Okay. And this is talking about the trust deed note.

A. Okay.

Q. Question 9. Or at line 9.

A. Oh. I'm sorry. I was looking at the first page of -- of the -- the Exhibit 1.

Q. Right. The second page is the trust deed note --

A. Yes.

Q. -- and that's what's being referenced here?

A. Yes.

Q. So is that your testimony; that you probably did?

A. Well, again, the trust deed note I would have given the -- the information, but the actual execution of the documents or preparation of the documents I wouldn't have done myself. The loan agreement, the note, yes, I did this. You know, anything that was basically a fill-in-the blank, that was me.

Q. So this testimony regarding the trust deed note which is contained at Exhibit 1 where you said, "I'm sure I probably did, yes," that's incorrect?

A. Well, again, I would have given the information for that, but that is something that the title company does, and so I may have misunderstood what we were talking about. But a trust deed note would have been actually prepared by the title company.

Q. So it's your testimony that when you -- when you testified in your deposition, you were wrong?

A. I must have been mistaken because, again, I -- I wouldn't have prepared actual physical preparation of this document.

Q. Is it your understanding that it is Winterfox -- Winterfox's position in this trial that you did not prepare any of the documentation or the notes in this -- or the loans in this case?

A. Ask that again.

Q. Is it your understanding that it's Winterfox's position that you did not prepare any of the loan documentation in this case?

A. That's not what I understand, no.

Q. Okay. Let's look at page 76. Starting at line 21, we're talking about deposition Exhibit 5 which is the second trust deed. It's not the second trust deed note but the second trust deed. It is at Exhibit 2.

"Q Okay. Let's look at this second trust deed for a moment. Or, actually, the second note. So it is the second note. I'm sorry. It's Exhibit 5.

"A Okay.

"Q Did you draft -- well, do you recognize this document?

"A Yeah. Did you draft it?

"Q Did you draft it?

"A I believe I did."

Did I read that correctly?

A. Yes.

Q. And is it your testimony that your -- today that at your deposition that was incorrect?

A. Well, again, I would have given them the information for this. The actual drafting of it, no, I did not draft. That's the -- that's what the title company does.

Q. You know Marco Fields. Right?

A. Yes.

Q. Who is she?

A. She is a friend and business associate that we worked together during this time.

Q. And did you share part of the $12,500 that Heritage Prescott received on your behalf, from this loan, with her?

A. Yes.

Q. What was her role in the Kitts loan transactions?

A. She was also an overseer of the information and to -- she had a lot of mortgage background experience and also took a look at the pre-approvals that were given to us to make sure they were actually doable loans that could be finished.

Q. Okay. Was it also her responsibility to prepare any necessary documentation to comply with rules or regulations relating to loan transactions?

A. That I don't know.

Q. Let's look at Exhibits 7 and 8. These are the documents that Winterfox testified in its responses to discovery constituted the disclosures and notices that were mailed to the Debtor on -- in December 2004 at the time of the loans. Did you prepare these disclosures?

A. No.

Q. Did you mail them?

A. No.

Q. Is it your understanding that Marco prepared them and mailed them?

A. The -- I don't know.

MS. BOULEY: Objection. Lack of foundation.

THE COURT: The objection's overruled.

MR. AFFLECK: I'm asking for --

THE WITNESS: I don't know. I -- there's --

Q. (BY MR. AFFLECK) You have no idea --

A. I just don't know who.

Q. -- would have prepared these?

A. If they would have been prepared, they would have been prepared by her; but I didn't know she did them and --

Q. Well, have you talked to her since --

A. -- sent them off.

Q. -- as to whether she prepared these?

A. I've talked to her. About whether they were mailed, no. I haven't talked to her about whether these were mailed.

Q. Do you recall in your deposition testifying that Marco called you and you talked to Marco at the time that these disclosures were allegedly given in December 2004, and that she told you they were given at the -- where she called you at the time the disclosures were given, allegedly given December 2004, and told you she was giving the disclosures?

A. I --

MS. BOULEY: Objection. Hearsay.

MR. AFFLECK: I'm asking him if he remembers.

THE WITNESS: I remember having a conversation; however, I don't know what was done or not done.

Q. (BY MR. AFFLECK) Let's look at your deposition at page 43. Starting at line 18.

"Q But Marco Fields said she mailed it.

"A Okay.

"Q Does that ring a bell to you? Did you ever talk to her about mailing things, mailing disclosures to Brian Kitts?

"A I know that she mailed out some disclosures. I didn't know what it all entailed though.

"Q How do you know she mailed out the disclosures?

"A Just because she told me she had mailed them out.

"Q When did she tell you that?

"A Not only in the process of the loan when she sent initial disclosures out, but, you know, after -- after the fact when we were getting all of our documents put together to go over to Fabian. I have seen a set of documents that said they had been -- they had been mailed out, and asked her about them."

Now, isn't it true that in your deposition you testified that she told you -- she informed you that she mailed them out not only at the time the loans were made, but also later on when the documents were gathered up and delivered to Fabian's office?

A. Yes. Again, we had talked about that.

Q. And she had called you up in December 2004 and said, "I've mailed the disclosures?"

A. That she was mailing them.

Q. Did you ever get a call from someone, anyone, asking you to locate the disclosures and notices that were sent to Mr. Kitts?

A. Um --

Q. Marco, Mr. Bybee, Mr. Jubber, Ms. Bouley?

A. I think we were all asked for -- well, yes, I was.

Q. Okay. So somebody asked you for them. Who?

A. The -- the attorneys from Fabian & Clendenin.

Q. And who would that be? Do you remember their names?